

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:

STEVEN FENTRESS BROWN
PATRICIA SUE BROWN
(Chapter 7 Case 93-41189)

Debtors

McCABE & PIETZSCH, P.A.

Plaintiff

v.

STEVEN FENTRESS BROWN
PATRICIA SUE BROWN

Defendants

Adversary Proceeding

Number 93-4159

MEMORANDUM AND ORDER

Debtors' case was filed July 15, 1993. On May 3, 1994, this Court

conducted a trial of the Objection to Discharge and Complaint to Determine Dischargeability of Debt filed by creditor McCabe & Pietzsch, P.A., against the Defendant/Debtors. After consideration of the evidence adduced at that trial, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Plaintiff law firm holds a judgment against the Debtors in the amount of \$564,267.14 plus interest from the date of judgment. (Exhibits P-1 and P-2). The debt is for legal services rendered to the Debtors and their wholly-owned corporation in defense of state and federal RICO and fraud suits. (Exhibit P-3).

Prior to May of 1989, the Debtors were the sole shareholders of Arizona corporations known respectively as Wheels, Inc., and Broadway Acceptance, Inc. Wheels, Inc., did business as a used car dealership in Mesa, Arizona on land owned personally by the Debtors ("the business property"). Broadway Acceptance, Inc., bought automobile finance contracts from Wheels, Inc.

Debtor Steven Fentress Brown has extensive experience as an automobile dealer. Debtor Patricia Sue Brown holds a degree in accounting from Arizona State University and has practiced as a Certified Public Accountant. She handled the finances,

kept the books and prepared the tax returns for the Debtors and their corporations.

In May and June of 1989, at a time when judgment was imminent in the Arizona RICO/fraud action, and at a time when they owed a very substantial debt to the Plaintiffs, the Debtors quickly liquidated their tangible assets located in Arizona. Despite the fact that they spent most of their time during three or four days per week working with the Plaintiff law firm during a five-month trial, they did not reveal to Plaintiff any facts about the liquidation of their assets. After the sale of their assets they moved to Savannah, leaving a letter addressed to one of Plaintiff's partners in the hands of a relative who mailed it from a border town with Mexico. The letter stated "do what you must and I will do what I have to do." (Exhibit P-15). The letter did not disclose Debtors' new place of residence.

Sale of the Business Real Estate

The Debtors transferred the business real estate to Steven Brown's son and daughter and their respective spouses at the end of May, 1989. The contract price for the property was over \$900,000.00. The contract contemplated that the purchasers would pay the Debtors \$500,000.00 at closing and assume debt equal to the balance of the purchase price. Although the closing documents and checks issued in connection with the sale suggest that the Debtors received \$500,000.00 for the property, the Debtor Patricia Brown testified at trial that Debtors received no consideration for the property at the time of

closing. The Debtors contend that they subsequently received only \$20,000.00 cash for the property several months after closing. I conclude, based on the evidence before me, that the purchasers continued to owe the Debtors \$480,000.00 for the purchase of the real estate.

Sale of Assets of Broadway Acceptance

At the end of May, 1989, the Debtors also transferred the assets of Broadway Acceptance, Inc., to the same relatives who bought the business real estate for \$500,000.00. Broadway Acceptance actually received cashier's checks totalling \$375,000.00 for its assets. Patricia Brown contradicted this evidence by her testimony at trial that, in reality, only \$300,000.00 was paid in cash at closing. Whatever the amount, the proceeds were deposited into the Broadway Acceptance account on which the Debtors were signatories. Debtors' only explanation as to the disposition of those funds was that it was used to "pay bills." Ultimately, the Broadway Acceptance account was closed and Debtors' produced no records to account for the use of those funds.

Whatever discrepancies may exist between the documents and the testimony, Debtors contend that after the application of all payments by the purchasers for the real estate and assets of Broadway Acceptance, the purchases continued to owe the Debtors \$780,000.00. Two of the purchasers, Derry and Gail Brown, filed bankruptcy in Arizona in which the Debtors asserted a claim for \$780,000.00 which was objected to by the

Trustee on August 1, 1993, after this bankruptcy case was filed. (Exhibit P-9). Patricia Brown believes that the claim was disallowed in the Brown bankruptcy, but acknowledges that, at the very least, Debtors still have a claim in that amount against the other two purchasers, Walter and Sharon Randall.

Sale of the Wheels, Inc., Stock

The Debtors sold their stock in Wheels, Inc., to Gene Mayfield, a long-time acquaintance of Steven Brown, in exchange for an interest in real estate on Cholla Bay in Mexico evidenced by a Bill of Sale. Debtors have never disposed of the interest they acquired under that document. Debtor Patricia Brown testified that the property may be occupied by Steven Brown's son-in-law, Skip Randall.

At the same time the Debtors were liquidating their Arizona assets, they received and deposited cashier's checks payable to one or both of them, totalling at least \$794,417.70. (Exhibit P-10).

The Debtors left Arizona for Savannah, giving Skip Randall a power of attorney with which to dispose of their Arizona home. They testified that the Arizona home sold for less than the outstanding debt on the property and that they were forced to send approximately \$3,500.00 to close the sale.

Debtors now reside at 292 Cushing Drive, Savannah, Georgia. In December, 1989, before the sale of their Arizona home, the Debtors bought their current residence on Cushing Drive. They titled the home in the name of Kathryn Terhune, Patricia Brown's sister, but have contended at all times that the home is their property. In consistent fashion, Form 2119 of the Debtors' 1990 tax return shows that they reinvested \$180,000.00 proceeds from the sale of the Arizona home in their current home on Cushing Drive in Savannah. (Collective Exhibit P-11). The Debtors made the downpayment on the property in the amount of approximately \$60,000.00. The Debtors have also made all of the mortgage payments which have been made on the Cushing Drive property since they moved into it, and have taken the interest deduction associated with those payments on their federal income tax return. (Exhibit P-11, Schedule A). The Debtors subsequently placed a second mortgage on the property with the consent of Kathryn Terhune. They received all of the loan proceeds and have made all of the payments to the lender. Patricia Brown testified at trial that "in our minds, its our home," that they intended to transfer title into their names, and that obtaining a transfer from Ms. Terhune would be a "mere formality."

After settling in Savannah, the Debtors purchased an interest in a real estate business. They paid \$100,000.00 cash and delivered a \$50,000.00 note to acquire a RE/MAX real estate franchise which is held in the name of Acorn Properties, Inc. (Exhibits

P-12 and P-13). The Debtors own 60% of the stock in that Georgia corporation.¹ The corporation has, among its assets, an income stream, a lease of office space, office equipment, and a Chevrolet S-10 pickup truck which the Debtors have used during the pendency of their case as their personal vehicle. The corporation also has physical possession of two Packard Bell computers which the Debtors bought personally from Sears.

The Debtors own and possess a 16'-17' Sunbird power boat. The Debtor/Wife testified that the boat is in the Debtors' possession, but is owned by her sister, Kathryn Terhune. Until her deposition in connection with this adversary proceeding, Kathryn Terhune knew nothing about the Debtors' contention that she owned the boat. (Deposition Terhune, p.34-37). The Debtor/Wife admits that the Debtors may have paid the purchase price of the boat. I find that the Debtor's deposition testimony regarding the boat is simply not credible and that they own the boat.

The Debtors prepared and submitted verified bankruptcy schedules in their Chapter 7 case. (Exhibit P-14). I find that those schedules are materially false or deficient in at least the following respects:

¹ The Defendants gave Attorney Michael Graham 40% of the stock of the corporation. Graham paid nothing for the stock, but may have contributed services to the Defendants and/or the corporation.

1. The Debtors' bankruptcy schedules do not show their interest in the Mexico real estate. *See* Schedule A;
2. The Debtors' bankruptcy schedules do not show their interest in the Cushing Drive property.² *See* Schedule A;
3. The Debtors' bankruptcy schedules do not disclose their interest in the Sunbird boat or the fact that it is in the Debtors' possession. *See* Schedule B, line 24;
4. The Debtors' bankruptcy schedules do not show their possession of the Acorn Properties Chevrolet S-10 truck; *See* Schedule B, line 23.
5. The Debtors' bankruptcy schedules do not reveal their right to receive \$780,000.00 from Debtor Steven Brown's children and children-in-law. *See* Schedule B, lines 15-17. Because the schedules call for information as of the filing date, the subsequent bankruptcy of two of the obligors and the Trustee's objection on behalf of the estate is immaterial.

² Even if the Defendants were correct in their contention that they have no legal interest in the Cushing Drive property or the Sunbird boat, the schedules are fraudulent: The Defendants answered "none" when asked in the schedules to disclose property in their possession which belongs to another person.

6. The Debtors' bankruptcy schedules do not show their interest in two Packard Bell computers purchased with the Debtors' funds which are in the physical possession of Acorn Properties, Inc. *See* Schedule B, line 26.
7. The schedules show the Debtors' interest in Acorn Properties, Inc., as having "no par value." The schedules make no disclosure of the fact that the Debtors paid \$150,000.00 for their interest in that business. *See* Schedule B, line 12.

The evidence is overwhelming that these material omissions were deliberate and fraudulent. The Debtor/Wife is a former Certified Public Accountant. She and the Debtor/Husband consulted with each other in the preparation of the schedules, and had experienced counsel to guide them in the event they did not understand specific questions on the schedules.

The Debtors have been given several opportunities to explain the loss or deficiency of their assets to satisfy their liabilities. They have been unable to do so except in vague generalities. The Debtors contend that their failure to explain the loss of their assets is attributable to the absence of records which were lost in their move from Arizona to Georgia.

CONCLUSIONS OF LAW

I conclude that three distinct statutory bases exist for denying the Debtors a discharge in bankruptcy.

Fraudulent Schedules

Section 727(a)(4) of the Bankruptcy Code provides that a debtor shall be denied a discharge if:

[T]he debtor knowingly and fraudulently, in or in connection with the case--

(A) made a false oath or account.

The law is clear in this Circuit that the deliberate omission of assets of even modest value will lead to a denial of a debtor's discharge. Swicegood v. Ginn, 924 F.2d 230, 232 (11th Cir. 1991); Chalik v. Moorefield, 748 F.2d 616, 618 (11th Cir. 1984). These Defendant/Debtors have omitted very significant assets from their schedules. It is not believable that they simply overlooked, *inter alia*, their home, their boat, their Mexico real estate and a \$780,000.00 receivable in preparing their bankruptcy schedules. Their fraudulent omission of assets requires this Court to deny the Debtors' discharge. Full disclosure of all information sought in the bankruptcy petition and schedules is at the heart of the bankruptcy process. Debtors who fail to meet their obligations in this regard are

clearly not entitled to a discharge. The Court has carefully considered all the evidence and concludes that this case cries out for such a result. I have considered the Debtor/Husband's poor health and the confusion created by their cross-country move and conclude that neither factor can justify the omissions outlined above. In doing so I have also weighed the evidence of their abrupt sale of assets, concealment of plans from their counsel, transportation of cashier's checks in excess of \$400,000.00 to Georgia, opening of new bank accounts in South Carolina, placing of their utility accounts in the names of their children and their home in the name of Debtor/Wife's sister, as overwhelming evidence of the malevolent and fraudulent intent in dealing with their creditors and in executing their oaths. To grant them a discharge on this evidence would be a travesty of justice. I now turn to alternative grounds for this holding.

Loss or Deficiency of Assets

Section 727(a)(5) of the Bankruptcy Code provides that a debtor shall be denied a discharge if:

[T]he debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

The Debtors have been given opportunities at and prior to trial to explain the loss or

deficiency of their assets to satisfy their liabilities. They have been unable to do so except in vague generalities. Therefore, their discharge must be denied on this basis as well. Chalik, 748 F.2d at 619-20.

Absence of Records

Section 727(a)(3) of the Bankruptcy Code provides that a debtor shall be denied a discharge if:

[T]he debtor has concealed, destroyed . . . or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

The Debtors admit that they do not have the records which would explain the disposition of the \$375,000.00 Broadway Acceptance sale proceeds. They do not have records to show the source or disposition of the hundreds of thousands of dollars deposited to their personal accounts just before they left Arizona. The Debtors contend that the records are missing because the Debtor/Husband's health forced them to leave Arizona suddenly, and without packing properly.

It is clear that the Debtors moved to Savannah in haste. The evidence

strongly suggests that the Debtors conducted and subsequently concealed their move to Savannah in an attempt to elude creditors. It is not surprising, therefore, that the Debtors lost records in the course of the move. However, I cannot find in that explanation a legal justification for the failure to maintain records. Therefore, the Debtors' discharge must be denied on this basis as well.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS
THE ORDER OF THIS COURT that the Debtors' Chapter 7 discharge is denied.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of June, 1994.